Tax Tribunals Users Group Meeting

By Teams

18 April 2024

16:30 -18:00

MINUTES

Some minor redactions have been made to the minutes to remove personal information

WELCOME AND INTRODUCTIONS

1. Judge Sinfield welcomed everyone to the fifth Tax Tribunals Users Group meeting and introduced Mrs Justice Bacon, President of the Upper Tribunal Tax and Chancery Chamber.

2. Mrs Justice Bacon gave a brief overview of the existing workload of the Upper Tribunal Tax and Chancery Chamber and update of retirements and appointments of judiciary.

3. Judge Sinfield then gave a brief review of the performance of the Tax Chamber in the last year as well as an update on recruitment and retirements.

GENERAL UPDATE UT TAX AND CHANCERY CHAMBER

4. The Chamber's tax work seems to have a broadly consistent number of outstanding PTAs as over previous years, but fewer outstanding substantive appeals and slightly fewer outstanding financial services cases in terms of the overall work. The tax work shows a slight decrease on previous years, but financial services work is still quite busy and continues to occupy much of the work of the Chamber. Some economists have been appointed to help with trade remedies appeals if and when they should materialise.

5. The major change in the chamber is retirements and appointments. Tim Herrington retired in September but he will sit in retirement on financial services cases for two years until September 2025. Phyllis Ramshaw, who divided her time between us and UTAAC, retired last summer but continues as a fee paid judge on Tax cases. Since September there have been only 2 ½ salaried judges, the half being Rupert Jones who divides his time between UTAAC and UTTCC. The Chamber has been fortunate to have an excellent cohort of deputy and fee paid judges who have stepped up and taken on more work during the period, including PTAs.

6. A JAC competition has taken place for the two empty salaried slots, and two excellent candidates have been appointed. The first is going to be announced tomorrow and will be starting on Monday next week. The second will be announced in May, to start in June. The Chamber will then be fully up to complement and hopefully back to business as usual.

In terms of the staff, there has been quite a lot of turnover. In particular the PA to the Chamber left last summer and there has been a process of reorganising the Chamber President's support office which is not yet resolved (but should be finalised by the end of the year). There are two

new staff on the admin team who will hopefully settle down quickly. Andrew Upton fortunately remains in post and has been training the new admin staff.

7. We have been considering the standard directions for appeals, and specifically the dates on which bundles need to be provided to judges. At the moment, there is a slight peculiarity in that under the standard directions the skeleton arguments must be filed 14 days and seven days (respectively) before the appeal. The skeleton arguments routinely refer to the agreed hearing bundles, but those do not have to be provided until later. This creates problems for a judge who wants to do advance reading. We are therefore considering revising the standard directions to ask for hearing bundles to be provided at the same time as the respondent's skeleton argument.

GENERAL UPDATE FTT TAX CHAMBER

8. We finish the year to 31 March 2024 with a lower outstanding active caseload than we had when we started although the total number of cases on our books is much higher in absolute terms.

9. Excluding the VAT Umbrella appeals, our caseload is reducing year on year. 'Normal' receipts have not yet returned to pre-pandemic levels but are on an upward trend; however, we have maintained relatively high disposal rates therefore the number of appeals on our books is reducing.

10. The default position is that all hearings are in-person at Tribunal Hearing Centres other than Basic cases (penalty appeals) which are listed as video hearings wherever possible using the Tribunal's Video Hearings Service platform. The Chamber continues to make valuable use of video hearings for certain other hearing types, e.g. case management and applications. Other cases will also be listed as video hearings where the judge considers that to be appropriate in all the circumstances. The Chamber has also conducted more hybrid hearings in the last year and has plans in place for the development of improved hybrid hearing facilities and the streaming of hearings to other courtrooms where a larger capacity is required.

FTT JUDICIAL HR

Joiners

11. The Tax Chamber welcomed four new salaried judges – Amanda Brown KC, Michael Blackwell, Michaela Snelders and Rosa (Ro) Pettifer. They will all be based in London except for Michael who will be based in Birmingham.

Long-term leave

12. Barbara Mosedale remains on long-term leave.

13. Jennifer Dean is currently on leave until the around the end of April 2025.

Leavers

14. Kevin Poole retired as a salaried FTT judge with effect from 1 April 2024 but he will continue to sit in the UT on a fee-paid basis after his retirement as a salaried judge and (we hope) in the FTT on suitable cases.

15. Paulene Gandhi, one of our fee-paid judges, has been appointed a judge of the FTT Social Entitlement Chamber in Asylum Support with effect from 15 April. She has accordingly resigned as a fee-paid judge of the Tax Chamber.

16. In addition, we have lost eight other fee-paid judges since the last Users' Group meeting.

Future numbers

17. We have acquired 5 new fee-paid judges in the recent recruitment exercise. The successful candidates have not yet been informed and, therefore have yet to confirm that they will accept their appointment.

18. Assuming they all accept (and they all put the Tax Chamber as their first preference), we should have 59 judges (12 salaried, including Barbara Mosedale and Jennifer Dean, and 47 feepaid) in the Tax Chamber in June 2024. However, in March 2019, we had 64 judges (12 salaried and 53 fee-paid).

19. We have also been granted permission to recruit another four salaried judges in the next FTT salaried recruitment competition launching in the autumn of 2024 (exact date to be confirmed). There will also be two EOI exercises: one for three fee-paid judges from other Chambers who have tax experience and want to sit in the Tax Chamber and another for five non-legal members from other Chambers who have relevant experience and would like to sit in the Tax Chamber. The process is under way but at a very early stage.

QUESTIONS PROVIDED IN ADVANCE –

Why aren't decisions of the Isle of Man VAT and Duties Tribunal not routinely published?

20. Although the Tax Chamber of the FTT provides judges to sit in the Isle of Man VAT and Duties Tribunal, we are not responsible for publishing its decisions. The decisions of the Isle of Man VAT and Duties Tribunal from 2020 are published on https://www.courts.im/courtprocedures/tribunals-service/tribunals/ under VAT and Duties. Not all decisions are published on that site but you can contact the Isle of Man Tribunal Service by e-mail on tribunals@gov.im to ask for others.

21. For appeals from the VAT and Duties Tribunal, look at The Staff of Government (Appeal Division) section of the Isle of Man Judgments Online website at https://www.judgments.im/content/home.mth. The Other Judgments section of that website also contains the decision of the Isle of Man VAT and Duties Tribunal from 2020 already on the VAT and Duties Tribunal page.

Have TTUG Meeting Minutes been published yet?

22. Judge Sinfield said he cannot see any reason why they should not be published. They are already issued to all members of the Tax Tribunals Users Group so are substantially in the public domain.

23. He said he will ask again if the minutes can be put on the Judiciary UK website page for the Tax Chamber which is at First-Tier Tribunal Tax Chamber - Courts and Tribunals Judiciary. Members of the TTUG will be notified when it has been done.

Listing where giving evidence from abroad - FTT

24. This is a difficult issue because whether or not the FTT will order HMRC to comply with paragraph 7 of the Guidance on Taking Oral Evidence from Abroad (22 July 2022) will depend on the circumstances and facts of the individual case. A judge might have decided that, in a particular case, it was not appropriate for evidence to be given remotely and therefore paragraph 7 of the guidance became irrelevant. The case management judges or hearing judge will inevitably be exercising their discretion and, even if Judge Sinfield might have taken a

different view, he would not interfere or comment unless the decision was so plainly wrong as to be outside the bounds of that discretion.

UT cost applications and right of reply

25. The question was in the course of interlocutory applications (where the respondent is typically given 14 days to respond), what are the Tribunals' views on the applicant then having a right of reply?

26. In one case the Tribunal said that the applicant could reply within 14 days, but then issued its decision. It may be that this was just a breakdown in communications in this particular case. But as to the more general question, a right of reply will be a matter of the discretion of the judges in any given case, and will depend on whether the judges consider that the materials before them are sufficient without a reply.

Can all practice directions etc be put on the FTT Tax Chamber website?

27. Judge Sinfield agreed that is a very good suggestion and was the intention. Work had begun on this but it was interrupted by the realisation that a number of practice directions and statements of practice needed to be reviewed and revised. With new salaried judges who bring fresh pairs of eyes to the process now is a good time to push this forward.

Can all HMRC generic bundles be listed and disclosed on the FTT Tax Chamber website?

28. No, they cannot because they are not our documents but HMRC's and are subject to change without us knowing.

Tribunal Rules

Interim relief

29. Judge Sinfield would not support a change in the FTT Procedural Rules to allow the FTT to grant interim relief. He does not think that conferring that power on the FTT can be done through changing the Rules because it goes beyond s9(3), 22 and 29(3) of and Schedule 5 to the TCEA 2007. That would require a change to the legislation. Mrs Justice Bacon added that it has not been suggested to the Upper Tribunal Tax and Chancery but they can consider it if it was put to them.

Interventions by interested third parties

30. The question is whether the FTT Rules could be updated to provide expressly that nonparties, that are affected by a particular issue, have a right to apply for permission to make representations. In fact, rule 9 already provides that a person (i.e. any person) may apply to be added as a party.

31. What the question is really aimed at is asking for the FTT to publish listing details, including a summary of the issues in the appeal, at an earlier time than at present to allow third parties to identify relevant appeals which (it is said) would be consistent the open justice principle.

32. Judge Sinfield supports any move to publishing details about the appeal earlier than at present in principle, however, there are a number of problems associated with the proposal. First, it is not practicable as the FTT is not in a position to provide a short summary of the issues comprised in the appeal. Who would draft that summary and who would ensure it is accurate? Secondly, appeals not infrequently settle between listing and the hearing. Would parties, particularly appellants, be happy to have the details of their appeals published at an early stage when they might be settled without revealing the existence of proceedings? Thirdly,

encouraging applications under rule 9 would be likely to create additional work for the Tribunal and to delay the proceedings. If one or both parties objected to a third party being added to proceedings as a second (or third or fourth) respondent under rule 9 of the FTT Rules, there would have to be an exchange or submissions and paper determination or, possibly, a hearing and interlocutory decision.

Costs

33. The suggestion is that the FTT Rules should be amended to introduce the power to award costs against a losing party that did not adequately consider ADR in advance of the appeal hearing. Judge Sinfield can see some merit in this. It has also been suggested by one of the judges that, either by a change in FTT Rule 10 or by a Practice Statement, a failure to comply with directions would be regarded as unreasonable conduct under rule 10(1)(b) thereby allowing the FTT to make an order in respect of costs. Judge Sinfield's preference is for a change in the FTT Rules (rule 10) but others disagree and say we can just announce that we now take the view that, say, a failure to consider ADR or a failure to comply with Directions will henceforward be regarded as unreasonable conduct and make the relevant party liable to an order for costs. Judge Sinfield agreed to consider this. There may be other categories of behaviours that should be regarded by the FTT as unreasonable conduct (e.g. submitting skeletons that are more than 20 pages long or electronic bundles that are not properly formatted or have more than multiple copies of the same document).

Hearing Bundles

34. That next question was whether the FTT would consider issuing a practice statement which encourages parties/advocates to exclude unnecessary material from hearing bundles. Judge Sinfield thinks that is a very good idea but he is not sure whether the FTT should issue a Practice Statement which encourages parties to cooperate to remove documents which will not be referred to in the hearing or whether to incorporate a standard direction to that effect in the case management directions. We clearly need to do something as it is not only parties who are put to costs and inconvenience by unnecessarily large hearing bundles but judges, members and staff at Hagley Road too. This is an Action Point for the FTT Judges to consider.

Publication of how cases are allocated to Judges in the FTT

35. At the last Users' Group meeting, Judge Sinfield said he would see if would be possible to publish the policy on how judges are listed to hear appeals. He will see if it can be put on the Judiciary UK website page for the Tax Chamber which is at First-Tier Tribunal Tax Chamber - Courts and Tribunals Judiciary.

36. This has not happened yet as there was some opposition. He will ensure that this happens as fast he can secure the change to the website (that does not happen overnight|).

Acknowledgement of notifications of appeals

37. What can be done about delays in the FTT acknowledging receipt of notices of appeals (and applications)? There are reasons for the delays but no excuses. The Tribunal still operates a largely paper-based system. Although it is possible to lodge a notice or appeal or application (e.g. for a closure notice) online, the digital journey stops there. All new appeals are printed out and paper copies are put on a file when it is opened and then put on a shelf. There is a digital system for recording appeal details e.g. name, number, parties' and representatives' contact details. It does not store or allow access to any email or documents: those are kept on the file on the shelf. In addition, there have been and remain some staffing issues (headcount,

retention, performance) which mean that some tasks have not been actioned as quickly as they should have been.

Automatic extensions of time

38. Has the FTT considered a rule similar to that under the CPR where extensions of a certain duration can be agreed by consent and no application is required (so that there is no need to clutter up the FTT's inbox and waste staff time)?

39. That is a very good idea and Judge Sinfield fully supports it. He regularly includes a direction to that effect in his case management directions. It is as follows:

> [1] Any party may apply to the Tribunal at any time for these Directions to be amended, stayed or set aside or for further directions.
>
> [2] An application under Direction [1] to amend, stay or set aside a direction must be made not later than five clear business days before the date for compliance with the direction sought to be amended, stayed or set aside stated in these Directions (as amended, if relevant).
>
> [3] Any application to amend the hearing window in Direction [*(*)] or extend a date for compliance with any direction (as amended, if relevant) made by the parties jointly in accordance with Direction [2] shall take effect as if it had been granted by the Tribunal unless the Tribunal notifies the Parties that the application is refused within four business days of receipt or makes a further direction.
>
> [4] Any application to amend, stay or set aside a direction that is not deemed to be granted under Direction [3] shall not be regarded as having any effect until the Tribunal confirms in writing that (if it be the case) it has been granted, and the parties shall continue to comply with the direction.

40. Subject to further comments, that direction or something like it could be incorporated in our case management directions in all Standard and Complex category cases.

Costs applications in the FTT where there is an appeal to the UT

41. It is said that there seems to be a growing trend of the FTT deciding costs applications after an appeal to the UT has concluded. Judge Sinfield is not aware of that development and does not think that it is to be encouraged. The FTT judge is likely to have a fainter recollection of the case and how it was conducted if some considerable time has passed since the FTT proceedings concluded. In those circumstances, it is likely to be more difficult to assess whether a costs order is appropriate and, if so whether to make a summary assessment of costs and in what amount. While there may be some cases in which it is appropriate to wait for the final outcome of the proceedings after all appeals have been exhausted before deciding a costs application, he considers that, in general, it is better for such applications to be dealt with immediately after the conclusion of the hearing in the FTT.

Transcripts in the FTT

42. The standard position is that if a party asks for permission to have the proceedings transcribed (and, for the avoidance of doubt, permission is needed), the FTT will direct that:

> (1) the requesting party shall arrange for an approved transcriber to prepare a transcript on each day of the hearing and to provide the transcript to the parties and to the FTT (in such manner as the Tribunal may direct) as soon as it becomes available; and

(2) provision of the transcript is conditional on the other party or parties undertaking to meet 50% of the transcription costs.

43. It is for the hearing judge to decide whether they would like a transcript but Judge Sinfield has never known a judge decline one.

44. The position is different where the proceedings have been recorded but not transcribed during the hearing and a party wishes to obtain a transcript afterwards, perhaps with a view to appealing. In that case, the other party has no right to the transcript at that stage and the FTT would not direct that one is provided to the other party or to the FTT (but the transcribers would normally offer to provide one to the judge for checking in those circumstances in my experience).

Naming advocates on decisions

45. Apparently, the name of junior counsel has been missed off the list of advocates on three recent FTT decisions. This is clearly wrong. If it happens then it should be possible to rectify this, even after the decision has been published, by contacting Hagley Road with the relevant details.

46. If there is a particular judge or judges who miss (or misspell) advocates' names then Judge Sinfield suggests that the advocate or their chambers or firm contact him and he will have a word.

Developments in ADR – Peter Nias

47. This is a short summary of the key points that have come out of the work of this Focus Group that was formed last year to consider what more could be done encourage the use of ADR. It is a Group comprising people from this TTUG and also HMRC DRSG who first considered the key issues. The issues divide into three categories - greater awareness of ADR, greater access to it and greater effectiveness.

48. One of the papers circulated was a list of the bullet points that had been identified. What emerged was that we should form and run a couple of multi stakeholder webinars that would be open not only to taxpayers, advisors practitioners but also HMRC officers who would be encouraged to join. Another initiative was for HMRC to look at their website links and review them for consistency: the main website from 2014, the CCFS 21 website, and the manual that came out last year, which raised issues of tax facts and without prejudice, which is also something that HMRC are going to take away and review.

49. This focus group is to consider what more can be done by the Court to encourage the use of ADR and bring its awareness to the attention of the parties. FTT Tax have also helped in this process. Over the months, Judge Sinfield had been sent various papers with some ideas including extending the Rule 3 Practice Statement and there will be a menu of proposals the group will put together and send to Judge Sinfield before any drafting gets done.

50. It would be good to give judges an opportunity to make Directions in respect of ADR, not an obligation to do so and not obviously in every case but there might be situations where they feel actually ADR should be considered and having a mandate through a Direction to do so would be useful. Perhaps with a Practice Statement (Rule 3 or Rule 5) confirming that judges may issue those Directions.

51. Another possibility is that at the listing information stage parties to confirm whether ADR has been considered and what the outcome of that has been. Perhaps a duty on HMRC in their Statement of Case, because that is when they first engage in litigation to explain whether they have considered the suitability of their case for ADR.

52. All of this, taking its lead from paragraph 9 of the CPR pre action protocol for Judicial review, which says that both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. But and this goes to the cost issues, parties are warned that if the protocol is not followed, including this paragraph 9, then the Court must have regard to such conduct when determining costs.

53. So there are some ideas possibly also the notice of appeal form T240 could have an extra box in it, to bring the possibility of ADR to the attention of the parties to encourage parties to consider and engage, but stopping well short of a mandatory obligation to consider it because people cannot can be forced to mediation and then to ADR.

54. However, the cost implications are relevant to be considered there.

55. The Focus Group's work has paused and HMRC have taken away a few points. More work will be developed in the next few weeks.

QUESTIONS AND AOB

56. There were no further questions or comments.